MOTION FILED
MAR - 4 1994

No. 93-880

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN and SHIRLEY HOBBS,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., AWARE WOMEN CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

CORRECTED COPY

On Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

LAURENCE GOLD
(Counsel of Record)
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-880

JUDY MADSEN, ED MARTIN and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMEN CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of neither party. Although the parties in this case have filed with the Court a general consent to all briefs *amicus curiae* in support of *either* party, counsel for respondent has informed the AFL-CIO that respondent does not construe that general consent as applying to a brief supporting *neither* party, and that, accordingly, respondent will not consent to the AFL-CIO brief. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 86 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. Historically, the AFL-CIO and its member unions, have had a vital interest in the First Amendment rights of citizens to disseminate their views among the public by picketing, handbilling and other peaceful means. Indeed, many of the leading cases that this Court has decided in the First Amendment area have involved the efforts of union members to engage in peaceful handbilling and other expressive activities. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). Because of the AFL-CIO's vital interest in this area, the Federation has filed briefs as an *amicus curiae* in a substantial number of this Court's recent cases involving the exercise of First Amendment rights in public streets. *See, e.g., International Society for Krishna Consciousness v. Lee*, —— U.S. ——, 112 S. Ct. 2709 (1992); *United States v. Kokinda*, —— U.S. ——, 110 S. Ct. 3115 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

3. The AFL-CIO and its member unions have also, over the years, had a vital interest in the scope of the power of courts to enjoin expressive activities in the context of public protests. One of the major studies of the injunctive powers of courts was prompted by the danger that such powers could be used overbroadly, or otherwise abused, in the context of labor disputes, to the effect that the legitimate expressive rights of unions and workers might be unnecessarily sacrificed. *See* Frankfurter & Greene, *The Labor Injunction* (1930). Indeed, recognition that particular danger may be posed by abuses of injunctive powers in the context of labor disputes led Congress to pass the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, which protects against such abuses in federal court proceedings.

4. This case involves a proceeding in a state court in which a judge, in response to objectionable conduct committed by those involved in public protest demonstrations, broadly enjoined a variety of peaceful expressive activities at the site of the protests as well as enjoining any continued commission of objectionable conduct. The attached brief *amicus curiae* examines the circumstances under which such a broad judicial response to the objectionable conduct of protesters is valid, under the First Amendment, and when such a broad response is invalid.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

LAURENCE GOLD
(Counsel of Record)
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for AFL-CIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
A. Delineating the issues properly before this Court	5
B. Devising standards for injunctions impeding expressive activity	12
C. Applying the standards to the buffer zones in this case	24
CONCLUSION	29

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Arkansas Writers Project v. Ragland, 481 U.S. 221 (1987)	18
Boos v. Barry, 485 U.S. 312 (1988)	15
Cardinale v. Louisiana, 394 U.S. 437 (1969)	12
Carey v. Brown, 447 U.S. 455 (1980)	18
Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175 (1968)	*passim*
Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993)	6, 10
City of Madison v. Wisconsin Industrial Relations Commission, 429 U.S. 167 (1976)	18
Coates v. City of Cincinnati, 402 U.S. 611 (1971)	17
Cohen v. California, 403 U.S. 15 (1971)	17
Cox v. Louisiana, 379 U.S. 536 (1965)	3
DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568 (1988)	27
Frisby v. Schultz, 487 U.S. 474 (1988)	15, 25
Gompers v. Buck's Store & Range Co., 221 U.S. 418 (1911)	19
Hill v. City of Houston, 482 U.S. 451 (1987)	17
Hustler Magazine v. Falwell, 485 U.S. 46 (1988)	17
Illinois v. Gates, 462 U.S. 213 (1983)	11, 12
International Society of Krishna Consciousness v. Lee, 112 S. Ct. 2709	27
Leathers v. Medlock, —— U.S. ——, 111 S. Ct. 1438 (1991)	18
Lewis v. City of New Orleans, 415 U.S. 130 (1974)	17
Martin v. City of Struthers, 319 U.S. 141 (1943)	25
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1940)	*passim*
Minneapolis Star v. Minnesota Comm'r. of Rev., 460 U.S. 575 (1983)	17
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)	2, 12, 21, 23
National Organization for Women v. Operation Rescue, 914 F.2d 582 (1990)	14

TABLE OF AUTHORITIES—Continued

	Page
New York NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989)	14
Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57 (1991)	14
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	2, 17, 25, 27
Planned Parenthood v. Holy Angels Catholic Church, 675 F. Supp. 617 (C.D. California 1991)	13, 15
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	18
Portland Feminist Women's Health Center v. Advocates for Life, 859 F.2d 681 (9th Cir. 1987)	15
Railway Express v. New York, 336 U.S. 106 (1949)	16
Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9 (1945)	9, 10
Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989)	14
Scales v. United States, 367 U.S. 203 (1961)	9
Shelton v. Tucker, 364 U.S. 479 (1960)	22
Terminiello v. City of Chicago, 337 U.S. 1 (1949)	17
United States v. Grace, 461 U.S. 171 (1983)	15
United States v. Robel, 389 U.S. 258 (1967)	9
Walker v. City of Birmingham, 388 U.S. 307 (1967)	19
Ward v. Rock Against Racism, 491 U.S. 782 (1989)	15
Yee v. City of Escondido, —— U.S. ——, 112 S. Ct. 1522 (1992)	12
Youngdahl v. Rainfair, 355 U.S. 131 (1957)	20, 21

STATE CASES

Chico Feminist Women's Health Center v. Scully, 208 Cal. App. 3d 230 (1989)	13, 15
Planned Parenthood v. Operation Rescue, 550 N.E. 2d 1361 (Mass. Sup. J. Ct. 1990)	13

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES	Page
29 U.S.C. §§ 101-15	18
Federal Rule of Civil Procedure 65(d)	7
MISCELLANEOUS	
Frankfurter & Greene, *The Labor Injunction* (1930)	3, 18
Ledewitz, *Civil Disobedience, Injunctions and the First Amendment*, 19 Hofstra L. Rev. 67 (1990)	3
Note, *Equity on the Campus: The Limits of Injunctive Regulation of University Protest*, 80 Yale L.J. 987 (1971)	3
Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 U. Pa. L. Rev. 746 (1970)	3
Shatz, *Picketing Injunctions in California, A Study of the Role of the Courts in Farm Labor Disputes*, 28 Hastings L. Rev. 801 (1977)	3

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arose out of a series of demonstrations by anti-abortion activists outside of a family planning clinic. Because the demonstrators were obstructing and otherwise impeding entry into the clinic and its parking lot, principally by standing in driveways and roadways, the clinic (along with other clinics) brought suit against several organizations and individuals, seeking injunctive relief. A precisely focused permanent injunction resulted, directed at the following enumerated activities:

> 1. trespassing on, sitting on, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed . . .
>
> 2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed . . .
>
> 3. attempting or directing others to take any of the actions described. [Petition for Writ of Certiorari ('Pet.") 4-5.]

The present petitioners, three individuals who were defendants in the underlying lawsuit and who were enjoined by name from engaging in these prohibited activities, do not now contest the issuance of this original injunction or its application to them.[1]

---

[1] All of the petitioners were named defendants in this action from the outset. The Petition for Writ of Certiorari notes several times that, according to a stipulation entered before the issuance of the original injunction, the three individuals who are the present petitioners had "not actually physically blocked access to abortion clinics located in Brevard or Seminole County." Pet. at 19, 21-22. The present appeal, however, concerns only the propriety of the parts of the *amended* permanent injunction that was issued later—and restricts communicative activity—not the substantial evidence question whether petitioners should have been found liable for committing unlawful acts and subject to any injunction at all

Several months after the issuance of this injunction, the plaintiff moved the trial court to modify the injunction, on the ground that demonstrators continued to engage in the activity enjoined and were also engaging in other activities, at the clinic and elsewhere, alleged to be harassing and/or intimidating to the clinic's clients and staff. After a three-day evidentiary hearing, the trial court issued a broad amended permanent injunction, prohibiting a wide range of nonspeech activity, but also limiting speech activity by the demonstrators within designated areas.[2]

In this brief we address the standards that govern in determining the validity of such "buffer zone" restrictions on speech. The generic issue here involves the nature and extent of the injunctive power to respond to disruptive actions by banning what would otherwise be First Amendment-protected communicative activities on public streets.[3]

This generic issue, and its importance, long antedates the abortion controversy. The labor movement, the civil rights movement, the student and antiwar movements, and a wide variety of other public protest movements have all, despite differences in goals and in tactics, generated questions concerning the appropriate role of injunctions in controlling street demonstrations of various kinds, in view of the need to frame such injunctions in a manner consistent with the First Amendment. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP*

---

on the basis of the original evidence before the trial court. *See* Initial Brief of Appellants in the District Court of Appeal of Florida, Fifth District, 5 DCA Case No. 93-00969, at 5; Pet. at i, Questions Presented.

[2] The relevant portions of the injunction are discussed in detail at pp. 24-29, *infra*.

[3] Public streets and sidewalks are, of course, areas in which the government's ability to restrict expressive activity is very limited. *See* pp. 14-15 *infra*.

v. Claiborne Hardware, 458 U.S. 886 (1982); *cf. Cox v. Louisiana*, 379 U.S. 536 (1965).[4] And, in all probability, in the future still other individuals and groups will press their strongly-held viewpoints through public protests in which fully-protected speech activity combines with street actions by some that obstruct, illegally intrude on, or even physically endanger others.

1. At the outset, we clarify why the questions raised in the Petition concerning the validity of the "buffer zone" provisions of the amended injunction are the *only* issues properly before the Court. *See* pp. 5-11, *infra*.

First, we show that the record does not support petitioners' contention that the extension of the amended injunction to all those "in concert" with the named defendants indicates that the injunction as a whole is viewpoint discriminatory. To the contrary, the record indicates that the "in concert" language—which is commonly used in the wording of injunctive relief—would *not* reach anti-abortion demonstrators whose actions are taken independently of the named defendants. *See* pp. 5-8, *infra*.

Second, aside from its argued evidentiary import regarding the nature of the injunction as a whole, the "in concert" provision is not properly before this Court. The present petitioners are all named defendants, covered by the injunction directly. Accordingly, no individual before the Court is directly affected by the "in concert" language, and the Court should not, in the abstract, determine the reach of that language, nor consider constitutional challenges to its inclusion. *See* pp. 8-10, *infra*.

---

[4] *See*, for discussions of the problematic use of broad injunctions in the historical context of various protest movements, Frankfurter & Greene, *The Labor Injunction* (1930); Rosenthal, *Injunctive Relief Against Campus Disorders*, 118 U. Pa. L. Rev. 746 (1970); Note, *Equity on the Campus: The Limits of Injunctive Regulation of University Protest*, 80 Yale L. J. 897 (1971); Shatz, *Picketing Injunctions in California, A Study of the Role of the Courts in Farm Labor Disputes*, 28 Hastings L. Rev. 801 (1977); Ledewitz, *Civil Disobedience, Injunctions and the First Amendment*, 19 Hofstra L. Rev. 67 (1990).

Third, petitioners' contention that they themselves are not properly covered by the amended injunction is also not properly before the Court. *See* pp. 10-11, *infra*.

2. The three "buffer zone" provisions in the amended injunction all seriously restrict expression on public streets and sidewalks; those locations are traditional public forums, in which the government's ability to regulate expressive conduct is very limited. Because injunctions raise special First Amendment concerns, the standards governing the validity of generally applicable time, place and manner restrictions in public forums are not sufficient to determine the validity of injunctions that restrict speech. *See* pp. 12-19, *infra*. On the other hand, this Court has made clear that in very narrow circumstances—namely, when "the essential needs of the public order" are at stake and the order is "couched in the narrowest terms that will accomplish the pin-pointed objective" (*Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968))—courts may enjoin peaceful expressive activity as a remedial measure in a case involving widespread, unlawful, nonspeech conduct. *See* pp. 19-22, *infra*.

As we show, this narrow judicial power may, consistent with the First Amendment, ordinarily be exercised only where: (a) a defendant has violated a preexisting, generally applicable legal norm; (b) a prior injunction applying only to illegal, nonspeech conduct, has failed to contain the unlawful activity; (c) the unlawful activity is continuous, pervasive, and severely threatening to the safety of others; (d) each aspect of the order that affects speech does so in measured increments and to the least degree necessary to eliminate the unlawful conduct underlying the injunction; (e) the order is tailored to allow some retention of speech rights in each area except where there has been pervasive violence; and (f) the order is further tailored so that each aspect of the speech-related restriction is directly related to the curbing of unlawful conduct. *See* pp. 23-24, *infra*.

3. Tested against these standards, the Florida Supreme Court's rationale for upholding the three buffer zone pro-

visions is inadequate for its task. Given that the decision below was rendered in the absence of a complete record, it may well be proper for this Court, after clarifying the proper standards, to remand the case for the Florida courts to determine, on a proper record, whether those provisions can pass muster under the exacting standards that the First Amendment compels. *See* pp. 24-29, *infra*.

ARGUMENT

A. *Delineating the issues properly before this Court.* Although two of the three Questions Presented in the Petition for Writ of Certiorari in this case concern the propriety of the various geographical "buffer zones" created by the amended permanent injunction, the body of the Petition itself focused largely on a distinctly different issue—the identity of the individuals who may be reached by an injunction of this kind. Consequently, before addressing the central questions we understand to be before the Court—those concerning the validity of direct restrictions on speech activity within certain areas—we explain why we believe these "buffer zone" questions are the *only* questions even arguably before this Court.[5]

1. The amended injunction applies to named organizations, named individual defendants (of whom the present petitioners are three) and "all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order." Pet. App. B-6. The Petition raises as a Question Presented "Whether a state court injunction prohibiting named demonstrators

[5] The following aspects of the injunction are *not* challenged, and would remain in effect whatever the disposition of this case in this Court: prohibitions upon (1) "entering the premises and property" of the respondent clinic; (2) "blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic;" (3) "harassing, intimidating or physically abusing, assaulting or threatening" staff members of the clinic; or (4) "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at, or using services" of the clinic or leaving or entering "homes of owners, staff or patients" of the clinic. Pet. App. B-7 to B-9.

and those acting 'in concert' from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association." Pet. at i. The Petition is largely devoted to this Question, and maintains, as had the Eleventh Circuit in reviewing this same injunction in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), that the "in concert" provision rendered the injunction as a whole viewpoint-specific and therefore invalid.

2. There is no merit to the substantive contention that the "in concert" aspect of the injunction renders the injunction as a whole viewpoint discriminatory.

The Eleventh Circuit's conclusion in *Cheffer v. McGregor*, pressed by petitioners upon this Court, was that:

> When reduced to its essentials, Judge McGregor's Amended Permanent Injunction, by operating on persons not before the court, serves as a statute of local effect regulating picketing by anti-abortion speakers. . . . That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted. . . . The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not. [6 F.3d at 710-11.]

As evidence that the injunction indeed had this effect, the Eleventh Circuit relied on a statement by the trial judge at a preliminary hearing for several individuals arrested for violating the amended injunction:

> Judge McGregor . . . explained (to the arrestees): [T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. [6 F.3d at 711 n.11.]

The "in concert" provision of the injunction, however, far from being an unusual characteristic of the injunction, as the Eleventh Circuit supposed, is so standard

that it is expressly sanctioned by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 65(d) (injunctions may be made "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.").

Moreover, contrary to the Eleventh Circuit's conclusion and petitioners' contention, the trial judge here did *not* state that he meant by this provision to allow conviction for contempt of the injunction on the basis of actions by *any* non-party professing antiabortion views within the proscribed areas. Rather, the trial judge made it clear that antiabortion protestors could *not* be convicted simply on the basis of the views they were promoting and their location in violation of the injunction. The question whether or not individuals meeting that criteria also met the additional criteria of being "in concert or participation" with the original defendants *would* be litigable at trial on the contempt proceedings.[6] While the trial judge did recognize that pro-choice protestors were unlikely to

---

[6] *See* Hearing of April 13, 1993 at 40 (answering an individual cited for contempt who said "But I was in concert with nobody" with "that would be a matter of defense that you would present at the time of trial"); *id.* at 43 (essentially the same colloquy repeated); *id.* at 93 (answering another individual cited for contempt who protested that "I'm not working in conjunction with anybody" with "again, those may be defensive matters . . . at the time of trial"); *id.* at 115 (answering another arrested individual inquiring whether the "ideology of . . . people . . . [had] anything to do . . . in the arrest", by stating "I don't know. All I know is the officer used his perceptions, his eyes, his ears, took note of the activities that were going on, and . . . he believed that you were in concert with those that had been enjoined."); *id.* (answering "no" to the inquiry whether "one of the reasons that I was arrested was because I opposed abortion in the clinic"); *id.* at 119-120 (in response to inquiry "where on my arrest report does it allege that I was in concert with anyone", answering that "it is embodied in the phrase violation of the Injunctive Court Order . . . this is an arrest report. It is not a formal charge. Presumably within the formal charge there will be that reference . . . and it is a matter that should be brought to the trial of the matter.").

be arrested under the injunction, that was because it is, as a matter of common experience, exceedingly unlikely that individuals who are promoting *pro-choice* positions are working in concert with, or participating in a single demonstration plan with, those *antiabortion* protestors who were parties in the initial action.[7]

Thus, the contention that the "in concert" provision, on its face or as applied, renders the injunction as a whole a viewpoint-based restriction on speech simply does not comport with the language of the injunction or its interpretation by the relevant enforcement authorities.[8]

3. We hasten to emphasize that, as actually applied to specific individuals engaged in associational and expressive activities, difficult questions with serious due process and First Amendment implications may arise,

[7] *See* Hearing of April 13, 1993, at 40 ("The Injunction is directed only against certain named Defendants, certain named organizations and those acting in concert with them. Presumably, as you say, the other side would not have been acting in concert with the named Defendants."); *id.* at 105 ("the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic.").

Moreover, the City of Melbourne maintained that it was *not* distinguishing in making arrests within the designated buffer zones between pro- and anti-abortion protestors, but was interpreting the "in concert" phrase "by taking into custody and bringing before the Court those persons who, after specific notice of the Injunction's terms, refused to comply and continued to congregate in, picket, patrol, demonstrate in, or enter the 'buffer zone.'" *Motion to Intervene and to Clarify Amended Injunction* at 4 (May 18, 1993).

[8] We note that if indeed the injunction did provide—whether in terms or as interpreted by the courts upon enforcement—that the "in concert" element of the order could be satisfied simply by showing that the individual in question was communicating an antiabortion message within one of the "buffer zones", then we would agree that the injunction in question is viewpoint-discriminatory and invalid. Where individuals are merely expressing the same views as the original defendants but are not doing so as part of a single integrated effort to perpetrate illegal activities, there is no basis for abridging *ab initio* those independent individuals' right to engage in expressive activities peacefully and without obstructing others.

depending upon the precise interpretation given to the "in concert" phrase.[9] In this case, however, there is no one before the Court who is subject to the "in concert" aspect of the injunction. The three individual petitioners all have been named defendants from the outset of this litigation, and have no direct interest in the application of the "in concert" provision, other than the evidentiary interest discussed above.

Under very similar circumstances, this Court has declined to adjudicate the question of the precise reach of an injunctive order reaching nonparties to the underlying litigation:

[9] Such serious questions would arise unless "in concert" were construed so as to preclude an individual from being liable for acting "in concert" with named defendants simply because the individual engaged in activities that would otherwise be protected speech and associational activities. For example, such questions would arise if an individual's speech activities were held to violate an injunction simply because (a) the individual is a member of an organization that is a named defendant; (b) the individual engages in speech activity in a public demonstration called by a named defendant; or (c) the individual shares common ideological goals with the named defendant. Rather, to avoid serious first amendment questions, the term "in concert" should be construed to bring under an injunction only those who associate with a defendant in order to accomplish the defendant's *unlawful* goals. *Cf. United States v. Robel*, 389 U.S. 258 (1967); *Scales v. United States*, 367 U.S. 203 (1961).

This Court has indicated that, aside from First Amendment considerations, due process considerations alone preclude application of an injunction to an independent non-party:

> [C]ourts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. [citations omitted]. [Federal Rule of Civil Procedure 65(d)] . . . is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding. [*Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945).]

> No concrete case is before us. We have here an abstract controversy over the use of these words, and it is as sterile as abstract controversies usually are. The employer objects to the words of the order merely as words. They do not enlarge its own obligation. . . . The Board is not here attempting to reach or to hold anyone in contempt by virtue of such orders. No [non-party] appears before us complaining that these words put him in jeopardy. No one can be punished for contempt because of these words until after a judicial hearing, in which their operation could be determined on a concrete set of facts. All that is before us is the question whether we will hold abstractly that this provision is an illegal one to include in . . . an enforcement order of the Court. [*Regal Knitwear v. NLRB*, 324 U.S. at 15-16.]

Since, as in *Regal Knitwear*, any nonparty potentially affected by the injunction will have the opportunity to contest its reach (as Ms. Cheffer did in *Cheffer v. McGregor*), this Court should not adjudicate the question in the abstract without a record concerning the actual connection between a particular individual and the defendants.

4. Petitioners also appear at points to be contending that, aside from the "in concert" provision, there is a defect in the amended permanent injunction of constitutional dimensions because the three individual defendants either were not found or could not properly have been found, on the actual record, to have violated the original permanent injunction. The Joint Appendix in this Court suggests that with respect to at least one, and perhaps two, of the three present petitioners, there is not substantial evidence to support a finding that the individual in question violated the original injunction. As we gather it, the petitioners' argument—with which we agree—is as follows: while there may be a predicate for enjoining individuals from engaging in certain communicative activity in certain places—if those individuals have committed, in violation of an earlier injunction not reaching speech-related activity, wrongful disruptive acts—there is no

predicate for thus enjoining an individual who has not violated such an earlier injunction.

Like the claim that the individual petitioners should not have been found liable in the first place on the basis of the record (*see* n.1, *supra*), this contention is not properly before this Court. Petitioners, to be sure, contend that the Florida Supreme Court should have "examine[d] the lower Florida court's record and separate[d] those known to have acted unlawfully from the Petitioners and their peaceful speech". Pet. 12. But such examination would have been an impossibility since petitioners, as appellants in the Florida courts, *did not designate transcripts of the relevant hearings* as part of the record but, instead, attacked the amended injunction on its face. *See* Joint Appendix, Index, at iii (including testimony at hearing that was "transcribed after the Petition for Writ of Certiorari and was not before the Supreme Court of Florida"); *id.* (objection of petitioners to inclusion of that testimony); Joint Appendix at ii (inclusion of testimony from the hearing that was before the Florida Supreme Court only because it was attached to the Appendix of respondents in that court); Appellees' Brief in the District Court of Appeal of Florida, Fifth District, Case No. 93-969 at 3-5. Since the question of petitioners' individual responsibility for violation of the original, limited injunction was not properly presented to the Florida Supreme Court (and was not in fact decided by that Court), that question is not properly presented to this Court on certiorari. *See Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).[10]

---

[10] This failure to certify to the Florida Supreme Court the full record of the hearing upon which the speech-restricting aspects of the injunction were based infects even those issues that are otherwise properly before this Court, and suggests that certiorari was improvidently granted. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. at 293, held that in determining whether an injunction reaching peaceful picketing is valid because the picketing had taken place in an atmosphere of pervasive violence, it is critical that the appellate courts not allow "constitutional freedom [to be] . . . defeated by insubstantial findings of fact

B. *Devising standards for injunctions impeding expressive activity.* The other three aspects of the injunction properly challenged in the Petition all involve "buffer zones" imposed by the injunction within which expressive activity is either forbidden or severely limited.[11] Two of the restrictions—those applying to the thirty-six foot "zone" around the clinic's property line[12] and the three-

screening reality." At the same time, the basic responsibility for this constitutionally necessary review "to resolve conflicts in the testimony and its interpretation was in the [state] courts and not here." *Id. See also NAACP v. Claiborne Hardware*, 458 U.S. at 923-24.

Federal questions are reviewable in this Court on certiorari, of course, only if properly presented first to the highest court of the state in which review is available. *See, e.g., Illinois v. Gates*, 462 U.S. at 218-22 (1983). This requirement respects the need for comity, the competence of state courts to adjudicate federal constitutional claims, and the importance of providing state courts with the opportunity to construe the challenged provisions after evaluating the strength of the constitutional arguments. *Id.*; *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Here, the state court was disabled, because of the way the present petitioners chose to frame their appeal, either from conducting meaningful constitutional review on the complete pertinent record or from considering, in light of that review, the need to limit the injunction by construction or modification.

[11] The Petition, in its body, also attacks as violative of the First Amendment paragraph (4) of the injunction, forbidding at certain times "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic." Petition for Writ of Certiorari at 16, 18. None of the three Questions Presented however, fairly read, encompass that attack. All three explicitly refer to the "buffer zone" provisions of the Petition, while paragraph (4) designates no geographical limitation within which a certain kind of expression is forbidden but, instead, applies to sounds and images, wherever generated, which can be heard or seen inside the Clinic. This Court has emphasized that only issues fairly included in the Questions Presented in the Petition will be considered. *Yee v. City of Escondido*, —— U.S. ——, 112 S. Ct. 1522, 1532-34 (1992).

[12] This zone has several exceptions, including a smaller, five foot "buffer zone" at the back of the clinic property, abutting a public highway. Pet. App. B-7.

hundred foot area around the residences of the Clinic's employees, staff, owners, or agents—effectively ban communication by the petitioners within the designated areas.[13] The third—the restriction applicable to the three-hundred foot area around the Clinic—forbids "physically approaching any person seeking services of the Clinic unless such person indicates a desire to communicate." It thereby bans, within that area, both traditional modes of handbilling and literature distribution, and any initiation of face-to-face oral communication.

The three different "buffer zone" provisions at issue in this case all seriously restrict expression on public streets and sidewalks. Indeed, the injunction issued in this case is more sweeping with regard to restricting expressive activity than almost any of the injunctions approved by other courts in the abortion protest cases.[14]

[13] Paragraph (3) forbids "congregating, picketing, patrolling, demonstrating, or entering" the designated area around the Clinic. Pet. App. B-7 to B-8. Paragraph (6) forbids, *inter alia*, "approaching, congregating, picketing, patrolling, demonstrating, or using bullhorns." It is not clear whether the prohibition on "approaching" in paragraph (6), like the ban on "entering" in paragraph (4), forbids petitioners from coming within the "buffer zone" area at all, or has some more limited meaning.

[14] The instant injunction is substantially more restrictive of speech than those approved in the following cases: *Planned Parenthood v. Holy Angels Catholic Church*, 775 F. Supp. 617, 625 (N.D. Cal. 1991) (creating a "buffer zone" of twenty five feet from any *entrance* to the Clinic, within which "[d]emonstrating, picketing, distributing literature, or counseling" is forbidden, and banning "[a]pproaching any person *once such a person has stated that he or she does not wish to be approached*" (emphasis supplied)); *Planned Parenthood v. Operation Rescue*, 550 N.E. 2d 1361 (Mass. Sup. J. Ct. 1990) (where protestors blocked entrance ways and lobbies of clinics by lying on the ground and some protestors chained themselves to doors and toilets inside the clinic, the injunction only "enjoin[ed] the defendants from engaging in illegal activity, such as trespass or obstruction of clinic entranceways"); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 237 (1989) (prohibiting "being within 15 feet of clients in their cars without having been invited"; creating a "buffer zone" ten feet wide from the doorway of the clinic to the

1. This Court has continually reaffirmed that whatever may be the case in other areas owned or controlled by the government, public streets and sidewalks

> are considered, without more, to be 'public forums'. . . . In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' [citation omitted] . . . Additional restrictions such as an absolute prohibition on a particular type of expression

---

nearest street, while allowing two picketers within the zone; creating a second buffer zone twenty-five feet from the building, within which picketers must remain at least ten feet apart; and addressing or offering literature "to any employee, agent, client, visitor, [or] business invitee of plaintiff *who has already refused such offer*" (emphasis supplied)); *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 584 (1990) (injunction forbids only trespassing, blockading, impeding, or obstructing access, and district court refusing on First Amendment grounds with Fourth Circuit approval, any broader injunction); *Portland Feminist Women's Health Center v. Advocates for Life, supra*, 859 F.2d 681, 684 (9th Cir. 1988) (prohibiting "demonstrating or distributing literature" in a rectangular buffer extending to the street and reaching twelve and a half feet on either side of the Center's door); *Roe v. Operation Rescue*, 710 F.Supp. 577, 589-90 (E.D. Pa. 1989) (injunction prohibits "trespassing on, blocking, or obstructing ingress or egress from any facility at which abortions are performed" in Philadelphia and "physically abusing or tortiously harassing persons entering, leaving, working at or using any services" at any such facility), *aff'd as to injunction*, 919 F.2d 857 (3d Cir. 1990); *New York NOW v. Terry*, 886 F.2d 1339, 1345 n. 1, 1362-64 (2d Cir. 1989) (injunction virtually identical in scope to injunction in *Roe v. Operation Rescue, supra*). In many of these cases the injunctions specifically stated that they should not be construed to restrict legitimate free speech activities.

The only injunction approved by a court in the abortion protest context that might arguably be more restrictive of speech than the instant injunction is that in *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 59, 72-73 (1991), a case in which protesters repeatedly entered into the clinic building and physically attacked patients and employees.

> will be upheld only if narrowly drawn to accomplish a compelling governmental interest. [*United States v. Grace*, 461 U.S. 171, 177 (1983).]

See also Frisby v. Shultz, 487 U.S. 474, 479 (1988); *Boos v. Barry*, 485 U.S. at 318 (1988). An otherwise valid "time, place and manner" restriction

> must be narrowly tailored to serve the government's legitimate content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so. . . . To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. [*Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).]

The Florida Supreme Court in this case, and most of the other courts that have in recent years reviewed abortion protest injunctions that directly restrict expressive activity, have viewed the issue before them as whether or not the injunction can meet the standards that govern the validity of time, place and manner restrictions in public forums.[15] As far as we are aware, however, *none* of the cases in which this Court has applied the "time, place and manner" standard has involved a judicially-devised injunction limiting the speech activity of specific groups and individuals *based upon particular illegal conduct by those groups and individuals*, as opposed to an across-the-board, generally applicable statute or administrative practice. The evident distinctions between generally applicable norms regarding expressive activity on particular public streets, sidewalks, and other public forums and judicially-devised injunctions such as the one in this case

---

[15] *See, e.g., Planned Parenthood v. Holy Angels Catholic Church*, 675 F. Supp. at 625; *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d at 686; *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d at 244.

counsel for somewhat different, and more particularized, standards for judging the validity of the latter.

a. Generally applicable statutes that are not content-based and that do meet the other time, place and manner standards ordinarily create relatively little danger of censoring one set of ideas or speakers but not others. Where the community as a whole has to live with a particular restriction, the possible effect upon diverse groups and the diffusion of their diverse ideas is likely to curb any censorial motive, to act as an inherent check on over-broad regulation, and thereby to lessen the need for close judicial oversight. *Cf. Railway Express v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply [such burdens] and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

In contrast to general legislation, injunctions, by their nature, reflect highly discretionary judgments that are tailored to particular speakers and situations, and that are directed only at those individuals before the court. The burdens imposed by an injunction often reflect judge-created norms rather than legislatively established rules.[16] And the individuals before the court are there because they have been brought before the court by other private individuals, not by public officials.[17]

[16] In this case, for example, the injunction severely restricts picketing and other demonstrations in residential areas, even though it does not appear that there is any statute in the relevant jurisdictions specially regulating residential picketing or other communicative activity. The result is an entirely judge-created norm, not filtered through or tempered by any legislative or other democratic process, and applicable only to the present defendants.

[17] In this instance, for example, the plaintiff clinic and the defendants obviously have entirely different views concerning the propriety of abortions. The clinic, as the instigator of this action, would have every incentive to attempt to curb not only the defendants tortious and illegal actions affecting the clinic's operation but also the communication of its message to the intended audience.

Moreover, it is plain that both the trial court and the Florida Supreme Court were concerned in large part with the likely emotional impact of petitioners' particular message about the moral propriety of abortion upon the clients and staff of the clinic, and not only with the physical impact of petitioners' obstructive and intrusive activities. *See, e.g.*, Pet. App. A-16, A-18, B-3, B-4 (disapprovals of anti-abortion protestors' use of such inflammatory rhetoric as "child murderer" and "baby killer" in describing physicians and other clinic personnel, and assertions that the state has legitimate need to protect such personnel from such inflammatory rhetoric).

Petitioners' message, and the particular words and images they used to express it, undoubtedly caused great anguish to those at whom the message was targeted. But censoring communication because of the impact of the message on listeners is, of course, entirely impermissible under the First Amendment. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). *See also Organization for a Better Austin v. Keefe*, *supra*, 402 U.S. at 419 ("[p]etitioners plainly intended to influence respondent's conduct by their activities . . . and were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability."); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Hill v. City of Houston*, 482 U.S. 451, 461 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

The identity-specific restrictions on speech that an injunctive proceeding may produce are associated with none of the safeguards against illegitimate speech restrictions that are normally associated with legislatively imposed restrictions of general application. As such, they may reflect subtle content-related concerns, and, for precisely that reason, would not ordinarily pass muster if enacted as statutes or ordinances. *See Minneapolis Star v.*

Minnesota Comm'r of Rev., 460 U.S. 575, 585 (1983) ("differential treatment" of speakers "suggests that the goal of . . . regulation is not unrelated to suppression of expression"); *see also Police Department of Chicago v. Mosley*, 408 U.S. 92, 99-102 (1972); *City of Madison v. Wisconsin Industrial Relations Commission*, 429 U.S. 167, 175-76 (1976); *Carey v. Brown*, 447 U.S. 455, 471 (1980); *cf. Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987); *Leathers v. Medlock*, —— U.S. ——, 111 S. Ct. 1438, 1444-45 (1991) (targeting a small group of speakers for speech-related regulation "raises concerns about censorship of critical information and opinion.").

Moreover, injunctions have procedural consequences different from those of generally-applicable statutes, consequences which have implicit First Amendment and other dangers as well. Those dangers, as applied to injunctions issued in labor disputes, were eloquently summarized by Justice Frankfurter before his accession to the bench, in his classic treatise that led to the enactment of the federal Norris-LaGuardia Act, 29 U.S.C. Sections 101-115:

> The history of the labor injunction in action puts some matters beyond question. In large part, dissatisfaction and resentment are caused, first, by the refusal of courts to recognize that breaches of the peace may be redressed through criminal prosecution and civil action for damages, and, second, by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions. Especially those zealots for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction," characterized by the consequences of a criminal prosecution without its safeguards, has been challenged. [Frankfurter & Greene, *The Labor Injunction* 200 (1930).]

In particular, injunctions, unlike criminal statutes, can often be enforced through civil proceedings, without jury trials or a criminal standard of proof. *See generally Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911). And, at least as a matter of constitutional law, when injunctions are enforced through criminal processes the individual charged with violating the injunction, again unlike the case with criminal statutes, cannot normally defend on the grounds that the injunction violated constitutional rights. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967). Thus, "[t]he impact and consequences of subsequent punishment for . . . abuse [of the freedom to speak] are materially different from those of [injunctions]." *Carroll*, 393 U.S. at 180-181.

As a result of these substantive and procedural considerations and their impact on First Amendment protections, the general rule has been that "ordinarily," the state should not rely on injunctions to serve its interests:

> [T]he state's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. [*Carroll*, 393 U.S. at 181.]

b. It is also the case, however, that the context-specific nature of injunctions permits in very narrow circumstances restrictions on speech activity that might not be valid if applied generally. Thus,

> [A] state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution [does not] deny . . . the power . . . to prevent the continuance and recurrence of *flagrant violence*, found after an extended litigation to have occurred under specific circumstances. . . . Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to

free utterance. [*Milk Wagon Drivers Union, supra,* 312 U.S. at 292 (emphasis supplied).]

Both in *Milk Wagon Drivers* itself and in later opinions, this Court has made clear that the constitutional permission to limit speech in order "to prevent future coercion" (*id.* at 296) is extremely limited and must be exercised with great caution. *Milk Wagon Drivers* involved "violence on a considerable scale", violence that was painstakingly catalogued in the opinion. 312 U.S. at 291; *see also id. at* 295 ("[t]hese acts of violence are neither episodic nor isolated"); 299 ("extensive violence").[18] Under those circumstances, the Court found, even peaceful picketing took on the complexion of a threat, causing "the persons in front of whose premises such picketing occurred . . . to believe that non-compliance would possibly be followed by acts of an unlawful character." 312 U.S. at 294. And the Court took pains to emphasize that only in such unique and limited circumstances could there be such governmental authority to curb speech:

> [T]he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force. . . . Right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing because it may provoke violence in others. . . . In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. [312 U.S. at 293, 296.]

In later cases, the Court has repeated its cautionary words, reiterating that a ban on otherwise lawful, peaceful expressive activity can be justified only where "a pattern of violence was established which would inevitably reappear in the event picketing were later resumed." *Youngdahl v. Rainfair,* 355 U.S. 131 (1957) (declining to permit ban on peaceful picketing under *Milk Wagon Drivers* because "[w]hat violence there was was scattered in time and much of it was unconnected with the picketing");[19] *NAACP v. Claiborne Hardware,* 458 U.S. at 323, 923, 924 n.67 ("This case is not like *Milk Wagon Drivers* . . . in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity. The violent conduct present in that case was pervasive. . . . [T]he injunction must be modified to restrain only unlawful conduct . . .")[20] *Cf. Carroll,* 393

[18] The violence involved "more than fifty instances of window-smashing; explosive bombs causing substantial injury to . . . plants . . .; [five] stench bombs," as well as several wrecked trucks, arson of a store and two trucks, the beatings of a store-keeper, a trucker, and workers, one shooting and other threatened shootings. 312 U.S. at 291-92.

[19] The record in *Youngdahl* on violence was as follows:

> All was not quiet, however. On one occasion nails were strewn over the company's parking lot and, about a week later, the whole lot was "seeded" with roofing tacks. Tacks were also scattered in the driveway of the plant manager's home and on the driveways of 12 of the nonstriking women employees. One of the pickets told the plant manager that she would 'wipe the sidewalk' with him and send him back to Wisconsin because he was 'nothing but trash.' The plant manager was followed by the strikers each time he left the plant; he also was harassed at night by occasional shouting at his home and by numerous anonymous telephone calls. . . . Shortly after midnight, on the morning of June 20, two women strikers deliberately drove a sharp instrument into two tires of a car owned by the daughter of one of the nonstriking women employees. At about 5:15 a.m., the police were summoned to the plant where they found a five-foot black snake inside the plant beneath a broken window. [355 U.S. at 133-34.]

Youngdahl was a case in which the federal interest in limiting state court injunctions was preemption under the National Labor Relations Act, not the First Amendment as such. This Court has, however, generally treated the protection accorded peaceful expressive activity during labor disputes by the NLRA and by the First Amendment as equivalent for purposes of determining the appropriate reach of state law, as *Youngdahl*'s reliance on *Milk Wagon Drivers* suggests. *See NAACP v. Claiborne Hardware, supra,* 458 U.S. at 918.

[20] The Court in *Claiborne Hardware* characterized the record as showing only "isolated acts of violence during a limited period" (458 U.S. at 924). The record in *Claiborne Hardware* concerning violence and other unlawful acts connected with the challenged

U.S. at 180 (speech loses "the broad guarantee of the First Amendment" only in those "special, limited circumstances in which speech is . . . interlaced with burgeoning violence").

More generally, this Court has cautioned that:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the *essential* needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In other words, *the order must be tailored as precisely as possible to the exact needs of the case.* [*Carroll v. President and Com'rs of Princess Anne*, 393 U.S. at 183-84 (emphasis added)].

In other words, while generally applicable time, place and manner restrictions need not meet a compelling interest/least restrictive alternative standard to be upheld, injunctions that limit expressive activities that are not otherwise unlawful are valid only if—in addition to meeting the standards applicable to time, place, and manner restrictions of general application—the governmental purpose is an "essential" one, unrelated to expression (such as curbing pervasive violence) and the ban on expressive activity *is as narrow as possible* to meet that "essential" purpose.[21]

---

boycott included shots fired at several houses, a brick thrown through a windshield, damage to a private flower garden, and two beatings. *Id.* at 903-05.

[21] Even though the standard of scrutiny with respect to speech-restricting injunctions is, for reasons stated in the text, *stricter* than for generally applicable time, place and manner restrictions, a restriction contained in an injunction can be valid although the same restriction contained in a statute or ordinance would not be. The reason for this distinction is that an injunction can be justified by the *particular* circumstances that triggered it, both as to the strength of the state interest and as to the narrow tailoring requirement, and is therefore not susceptible to an overbreadth challenge.

2. While this Court has not had occasion to spell out in detail the application of the *Milk Wagon Drivers/Carroll* standard to concrete situations, several principles are suggested by the injunction cases, by general First Amendment principles, and by the standard itself.

First, to begin with a point that should be obvious but is not uniformly followed, there should be no injunction without an underlying finding that the plaintiffs have made out a pertinent legal cause of action against the defendants who are to be restricted by the injunction. Injunctions are, of course, *remedies* to be imposed once a legal wrong is proven, not an opportunity for free-wheeling determination of social policy by judges. Particularly where speech is at issue, concerns over viewpoint, content, and identity discriminations discussed earlier militate against individualized restrictions on expression applicable only to certain people, and not justified by prior *illegal* activity *by those people*.

Second, except in the "flagrant violence" situation, *see Milk Wagon Drivers*—in which even otherwise peaceful expressive activity can only be taken as a threat of future violence if the demonstrators demands are not met—any injunction should ordinarily be limited, in the first instance, to restraining *illegal* conduct. *NAACP v. Claiborne Hardware*, 458 U.S. at 924 n.67. If and only if that restraint fails to curb the illegal conduct is there any basis at all for believing that a broader injunction is necessary. Moreover, this incremental approach should be required as to *each* aspect of the injunction; the fact that certain illegal conduct continues after the initial injunction would not justify a speech-restricting injunction that controls conduct of a different kind, or in a different location.

Third, only where controlling the unlawful conduct at issue is "essential [to] . . . public order" (*Carroll*, 393 U.S. at 183) can the circumstances justify any sort of prophylactic injunction impinging directly on expressive activity. Thus, only unlawful activity that is continuous,

pervasive, and severely threatening to the safety of others can provide the necessary predicate.

Fourth, to be "tailored as precisely as possible to the exact needs of the case" (*Carroll*, 393 U.S. at 184), *each* aspect of any injunction that affects speech activity should do so in the most measured increments and to the least degree necessary for eliminating the particular intolerable unlawful conduct underlying the injunction. In particular, the physical area covered by any restriction on communicative activity should be as confined as possible and should be based on site-specific justifications. Moreover, the context-specific, precise tailoring that is necessary dictates that, absent the extreme and pervasive violence situation the Court found present in *Milk Wagon Drivers*, peaceful expressive activity should not be *entirely* forbidden within any area.

Fifth, and finally, any injunction issued as a result of unlawful conduct should be carefully limited so that *every* provision that might affect otherwise protected speech is a remediable measure that demonstrably responds to the pervasive unlawful *conduct* that triggered its issuance. There must be a direct, articulable connection between each aspect of the speech-related restriction and increased probability of curbing unlawful conduct. The fact that the defendants engaged in unlawful, enjoinable conduct cannot be deemed to create an open season on the right to engage in expressive activity. And, to underline what should be apparent, protecting others from the *content* of the speech (unless the speech itself is unprotected under the First Amendment) is an impermissible basis for an injunction.

C. *Applying the standards to the buffer zones in this case.* Because the amended injunction's three different "buffer zone" provisions involve somewhat different considerations, we review each in turn.

1. *The 300-foot "buffer zone" around residents:* The original injunction contained no prohibition upon any activity around the residences of clinic staff, nor, it appears,

is there any statute, ordinance, or rule of law applicable in the pertinent areas specifically forbidding in residential areas activity of the intrusive kind proscribed by the statute upheld in *Frisby v. Shultz*. Rather, the trial judge simply concluded, on his own, that the activity enjoined is "impermissible conduct and should be . . . restrained." Pet. App. B-4, B-6.

Thus, there is no finding that the broad prohibition is related in any way to curbing *any* illegal activity, or redressing any legally cognizable wrong. And, since there was nothing in the original injunction pertaining to activity away from the clinic, the residential "buffer zone" cannot be justified as necessary to assure compliance with the earlier injunction. Furthermore, the circle with a three-hundred foot radius surrounding each house, within which communicative activity is broadly banned, is not based on any focused, narrow, site-specific considerations, and, because of its sheer size, would appear to bar *any* meaningful in-person communication by defendants.

These deficiencies in the trial court's approach parallel those this Court has found decisive in prior cases. *See Organization for a Better Austin v. Keefe*, 402 U.S. at 417, 419-20 (holding invalid an injunction against, *inter alia*, passing out leaflets to a real estate dealer's neighbors on their doorsteps "describing his real estate activities and accusing him of being a 'panic peddler,'" stating that "[n]o prior decisions support the claim that the interests of an individual being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court"); *Frisby v. Shultz*, 487 U.S. at 486 ("generally directed means of communication [including handbilling and house-to-house solicitation] . . . may not be completely banned in residential areas."); *Martin v. City of Struthers*, 319 U.S. 141, 142, 149 (1943).[22]

---

[22] Unlike the narrow ban on focused picketing upheld in *Frisby*, the injunction in this case is *not* limited to "picketing focused on, and taking place in front of, a particular residence." 487 U.S. at 483, and *would prohibit* "[g]eneral marching through residential

2. *The 300-foot "buffer zone" around the clinic:* The original injunction prohibited the blocking of ingress to and egress from the clinic and "physically abusing persons entering, leaving, working or using any services" at the clinic. After the hearing on amending the injunction, the trial court found that as a result of the demonstrators' actions, traffic was slowed on the street adjacent to the clinic as it turned into the clinic's driveway and, as that happened, "the vehicle would be approached by persons designated by respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services." Pet. App. B-3; *see also* Pet. App. B-4 (demonstrators "push[ed] pamphlets in car windows"). The injunction as amended therefore restrained defendants in an area within 300 feet of the clinic, from engaging in conversation with or delivering any literature to any client of the clinic, unless the client affirmatively invites the communication. Pet. App. B-8.

This aspect of the injunction raises constitutional problems similar to those raised by the 300-foot residential buffer zone. Once again, the trial court restrained the activity that the court viewed as "impermissible," with no finding that any legal norm, statutory *or* injunctive, was ever violated. Pet. App. B-6. And once again, there appears to be no site-specific basis for restricting speech in such an extremely wide, 300-foot radius area. Nor is it apparent how the sweeping prohibition is "pinpointed" at curing the cited improper conduct, *viz.*, pressing literature upon individuals through moving car windows and pursuing sidewalk "counseling," even after contact with the "counselors" had been firmly refused; if those were the

---

neighborhoods, or even walking a route in front of an entire block of houses," as well as "go[ing] door-to-door to proselytize their views." The "buffer zone" provision, applying the ban only within a 300 foot radius circle, is certainly not sufficient to bring the restriction within *Frisby*: the average suburban home frontage is about fifty feet, so the geographical limitation could ban communicative activity several houses away, or even on the next block or a parallel or perpendicular block.

concerns, the 300-foot clinic buffer zone limitation could have simply prohibited that particular conduct.

Quite aside from this, it is questionable why it is "essential to the public order"—or relevant *at all* to public safety concerns—that individuals seeking the clinic's services be protected from even the *invitation* to read proffered literature or to speak with the demonstrators. To the contrary, the First Amendment has long been understood to protect the right to *approach* other citizens to distribute handbills and discuss ideas. *See International Society of Krishna Consciousness v. Lee,* 112 S. Ct. 2709, 2713-15 (O'Connor, J., concurring) (even in a nonpublic forum, a ban on peaceful leafletting is unreasonable); *id.* at 2720 (plurality opinion) ("the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the . . . First Amendment"); *DeBartolo Corp. v. Florida Gulf Coast Trades Council,* 485 U.S. 568, 575-76 (1988); *Organization for a Better Austin, supra.* As this Court has repeatedly recognized, the burden of refusing to accept a handbill or of listening to non-threatening discussion is not one of great weight in the free speech calculus created by the First Amendment. In contrast, as the Court has also recognized, the demonstrators' right to tell the intended audience that there is something they would like to say to them or material they would like to distribute to them *is* so central to effective communication that a ban on that activity is tantamount to a complete ban on communication with the intended audience within the relevant area. It is doubtful, for example, that clients of the clinic will invite total strangers hundreds of feet from the building to give them reading material they have no reason to know is available.

3. *The 36-foot "buffer zone" surrounding the clinic*: As noted, the original injunction banned obstruction of ingress to and egress from the clinic. After the modification hearing, the trial court affirmatively found that there had been serious and persistent interference with ingress because of demonstrators massed on the vehicle right-of-way adjoining the clinic and in the driveway to the clinics

parking lot. Pet. App. B-2, B-3. The 36-foot buffer zone, within which *all activity* (communicative or otherwise) by defendants was banned, encompassed in part that right-of-way and driveway, while permitting peaceful demonstrations across the 21-foot road from the driveways and on the shoulder of an adjoining access road.

The fact that "traffic [was] slowed . . ., sometimes having to momentarily hesitate or stop" (Pet. App. B-2) is not equivalent to pervasive violence or other major dangers to public order. There was, however, as to this buffer zone, a clear connection between violations of the initial injunction and the scope and content of the subsequent injunction of speech-related activity within the zone. The physical reach of the speech restriction does, on the Dixie Way side of the clinic, directly reflect the configuration of the site: Because of the twenty-one foot vehicular street and the driveways, protecting a more limited area from crowds too large to stay on the sidewalk would not have served to protect the traffic flow.

On the other hand, within the 36-foot "buffer zone", the ban on communicative activity is *absolute*. It is our submission that absent a sustainable finding of pervasive violence like the one in *Milk Wagon Drivers*, there is *no* basis for such an absolute ban. Communication could have been preserved, while eliminating the crowding and congestion that had obstructed traffic, by permitting a small number of peaceful picketers or handbillers within the "buffer zone" area. Doing so would permit the message to be communicated to those approaching the clinic on the clinic side of the vehicular access road.[23] As it stands, then, the 36-foot "buffer zone" provision is not "tailored as precisely as possible to the exact needs of the case" (*Carroll*, 393 U.S. at 184).

---

[23] While the 36-foot area is explicable on the sides of the clinic with the driveways and access roads, no such ingress and egress concerns can justify the extension of the "buffer zone" to sides of the clinic not abutting roads.

vision is not "tailored as precisely as possible to the exact needs of the case" (*Carroll*, 393 U.S. at 184).

The Florida Supreme Court did not apply the proper standards in this case. However, since that court did not have a complete record before it (*see*, n.10, *supra*), it had no opportunity to fully consider the constitutional issues raised above concerning the various "buffer zone" provisions, or to consider construing or modifying various provisions of the amended injunction to meet both First Amendment concerns and legitimate injunctive purposes. It therefore may be appropriate for this Court, rather than examining the full record in the first instance, to remand after making clear the proper standards.

CONCLUSION

For the reasons stated above, the case should be remanded to the Florida Supreme Court.

Respectfully submitted,

LAURENCE GOLD
(Counsel of Record)
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for AFL-CIO